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## THE THEORY OF PUNISHMENT.\*

THERE was a time when the notion that blood demands blood was held so firmly and so crudely that little distinction was made between intentional and unintentional acts of homicide. Ancient law abounds in traces of this inveterate instinct of primitive humanity. We see the legislator of the Pentateuch endeavoring to limit its operation by the institution of Cities of Refuge, whose walls protected the unintentional homicide against further pursuit by the avenger of blood. We see the same inability to distinguish between voluntary and involuntary homicide in the curious notions of the Canon Law (still, perhaps, theoretically in force) about the "irregularity" contracted by consecrated persons and consecrated places through the most unwitting bloodshed, and not contracted by the most atrocious violence which involves no physical effusion of blood. We see the same curious but once useful superstition in the old law of Deodand, which required the forfeiture of the inanimate object or the irrational animal which had, in the most accidental way, been the instrument of man's death. Thus even the horse from which a fatal fall had been sustained, or the boat from which a man had drowned himself, were made the subjects of this peculiar application of retributive justice. At the present day the cruder forms of this old-world cry of blood for blood are no longer heard; but what is, perhaps, after all only a more refined form of the same fundamental notion lingers in the theory which makes the primary object of punishment to be retribution. A man has done wrong, therefore for that reason and for no other, it is said, let him be punished. Punishment, we are told, is an end in itself,—not a means to any end beyond itself. Punishment looks to the past, not to the future. The guilt of the offence must be, in

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\* The substance of this paper was preached as an Assize Sermon at St. Mary's, Oxford, in February, 1891.

some mysterious way, wiped out by the suffering of the offender, and that obliteration or cancelling of the guilt-stained record, be it noticed, is conceived of as quite independent of any effect to be produced upon the sufferer by his bodily or mental pain. For, the moment we insist upon the effect produced upon the sufferer's soul by his punishment, the retributive theory is deserted for the reformatory or the deterrent.

"Juridical punishment," says Kant, "can never be administered merely as a means for promoting another good, either with regard to the criminal himself or to civil society, but must in all cases be imposed, only because the individual on whom it is inflicted has committed a crime. . . . The penal law is a categorical imperative; and woe to him who creeps through the serpent-windings of utilitarianism to discover some advantage that may discharge him from the justice of punishment, or even the due measure of it!" He goes on to defend the *lex talionis* as the only just principle for the allotment of penalty to crime, and to make the famous declaration that, "if a civil society resolved to dissolve itself with the consent of all its members (so that punishment would be no longer required for deterrent purposes), the last murderer lying in the prison ought to be executed before the resolution was carried out." \*

There you have the retributive theory propounded by the prince of modern philosophers; and it is still defended by philosophers and philosophic jurists in Germany, England, and America. For most of us, whether or not we have consciously abandoned the theory, this view exercises but little influence over our ideas of *human* justice, though it is to be feared that it still casts a black shadow over men's conceptions of that future punishment, which reason compels the Theist to expect for unrepented sin.

It is difficult to argue against a theory whose truth or falsehood must be decided for each of us by an appeal to his own moral consciousness,—by the answer which he gives to the simple question whether he does or does not in his best

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\* Kant's "Philosophy of Law," E. T. by Hastie, 1887, p. 195 ff.

moments feel this mysterious demand that moral guilt should be atoned by physical pain. That the sight of wrong-doing—particularly when it takes the form of cruelty—does inspire a sentiment of indignant resentment in healthy minds, and that it is right and reasonable that in all legal ways that sentiment should be gratified, no sensible person will deny. But that is only because experience shows that the infliction of pain upon offenders is one of the most effectual ways—and in some cases the only effectual way—of producing amendment. The question is whether, *apart* from its effects, there would be any moral propriety in the mere infliction of pain for pain's sake. A wrong has been done—say, a crime of brutal violence; by that act a double evil has been introduced into the world. There has been so much physical pain for the victim, and so much moral evil has polluted the offender's soul. Is the case made any better by the addition of a third evil,—the pain of the punished offender, which *ex hypothesi* is to do him no moral good whatever? If, as enlightened philanthropists sometimes seem to imagine, the direct effect of all punishment that really is punishment were to inspire the offender and others with a passionate desire to repeat the offence,—if in our prisons a liberal diet, genial society, free communication with the outside world, artistic cells, abundant leisure and varied amusement were found in practice to be more deterrent and more reformatory than solitude and plank bed, skilly and the narrow exercising yard, would the philosopher of Königsberg himself have forbidden the institution of a code of graduated rewards for our present barbaric system of pain-giving punishments?

Perhaps the simplest way of satisfying ourselves that it is impossible to reconcile the intuitive theory of punishment, either with the actual practice of our courts or with any practicable system of judicial administration, will be to notice a modification of the theory by Mr. Herbert Bradley. Mr. Bradley seems to be so much struck with the obvious disproportion between the moral and the legal aspect of various offences, that he actually gives up the doctrine that the *amount* of punishment should correspond with the amount of the offence,

while still maintaining that punishment in general is justified only by the past sin, not by the future advantage.

"We pay the penalty because we owe it, and for no other reason; and if punishment is inflicted for any other reason whatever, than because it is merited by wrong, it is a gross immorality, a crying injustice, an abominable crime, and not what it pretends to be. We may have regard for whatever considerations we please,—our own convenience, the good of society, the benefit of the offender; we are fools, and worse, if we fail to do so. Having once the right to punish, we may modify the punishment according to the useful and the pleasant, but these are external to the matter; they can give us no right to punish, and nothing can do that but criminal desert. . . . Yes, in spite of sophistry, and in the face of sentimentalism, with well-nigh the whole body of our self-styled enlightenment against them, our people believe to this day that *punishment is inflicted for the sake of punishment*," etc.\*

Now, in the first place, is this consistent? If punishment is "modified" for utilitarian reasons, does not that mean that it is inflicted partly for retribution and partly for some other reason? If so, we do not pay the penalty because we owe it, *and for no other reason*. And, secondly, is it logical? If sin by itself confers the right and imposes the duty of punishment, there must be a right to inflict either a definite amount of punishment or an infinite amount. If the latter, it is obvious that the state will always have the right to inflict any quantity of punishment it pleases upon any of its citizens at any time, since all have sinned and incurred thereby unlimited liability to punishment. "Use every man according to his deserts, and who should 'scape whipping?" Such a contention would render the whole theory nugatory. If, on the other hand, wrong-doing confers a right to inflict a merely limited amount of punishment, Mr. Bradley is open to the following objections:

(1) How can this amount be fixed? How can moral guilt be expressed in terms of physical pain? To any one who believes that punishment is justified by its effects, the right or just amount of punishment is that which will best serve the ends for which punishment exists,—*i.e.*, deterrence and reformation. But how, apart from its end, can the amount of punishment due to each offence be fixed? I find in my

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\* "Ethical Studies," 1876, pp. 25, 26.

own mind no intuitions on the subject, and believe that if we were all to sit down and attempt to write out lists of crimes, with the number of lashes of the cat or months of imprisonment which they intrinsically merit, we should find the task an extremely difficult one, and should arrive at very discordant results. At all events, such a task would be hopelessly out of harmony with the actual practice of the most enlightened tribunals. It is obvious that drunkenness in a "gentleman" will often be, morally speaking, as culpable as burglary in an hereditary criminal. But it is not so much the practical as the theoretical impossibility of the task that I wish to emphasize. The idea of expressing moral guilt in the terms of cat or birch-rod, gallows or pillory, hard labor or penal servitude, seems to be essentially and intrinsically unmeaning. I can see no commensurability between the two things.

(2) Assuming this difficulty removed, it is clear that when the proper amount of punishment has been inflicted, the right to punish has been exhausted. If any further punishment is inflicted for utilitarian reasons, it will be simply, as Mr. Bradley premises, so much unjustifiable cruelty. If forty stripes save one is the proper punishment for any offence, the fortieth will be simply a common assault, no matter whether it is inflicted by the private individual or by the public executioner.

(3) The only way of escape open to Mr. Bradley would be to contend that though the state may not for utilitarian reasons increase, it may for utilitarian reasons reduce the ideally just punishment. The position is obviously an arbitrary one, and it is open to this objection: it involves the admission that in all cases wrong-doing confers a right, but does not impose a duty of punishment. Can it be moral that society, if it might, without failure in duty, remit punishment, should punish just because it pleases so to do? This would be to admit that whether we shall punish or not is to be determined by mere caprice. So, if you say that it is duty to punish, except where utilitarian considerations demand that less than the ideal amount should be inflicted, you practically admit that whether any punishment should be inflicted at all, and how much, must be determined by utilitarian considerations.

The theory of an intuitive command to punish will have reduced itself to the somewhat barren assertion that you have no right to punish except where there has been wrong-doing. This is a proposition which it is hard to dispute, since, as a general rule, the public purpose is served by hanging the wrong man. There are, however, cases where it must be admitted that suffering may lawfully be inflicted on innocent persons,—*e.g.*, where a barony or a hundred is made to pay compensation to persons injured in a riot, or where a savage village that has sheltered a murderer is burnt by a European man-of-war. These are two exceptional crises in which it is necessary, in the interests of society, to be less exacting in the matter of evidence than a civilized state ought to be in quiet times.

We are here, however, straying into difficult and disputable questions of ethics, and it is best to be content with simply pointing out that when we have applied to the theory the qualifications which are demanded by the obvious facts, it is reduced to very modest limits. It amounts simply to the assertion that punishment should be inflicted only on the guilty; it admits that in its infliction the legislator should be governed by utilitarian considerations, that is, by the end which punishment actually serves.

From the point of view which we have hitherto been taking, the retributive theory will appear to most of us a mere survival of by-gone modes of thought. Yet, as is often the case with theories on whose vitality refutation seems to have no effect, the retributive theory of punishment contains a good deal of truth at the bottom of it,—deeper truth perhaps than the Benthamite view, which has taken its place in popular philosophy. There are, I think, three elements of truth which the retributive view of punishment recognizes, and which the ordinary utilitarian view often ignores.

(1) Firstly, it possesses historical truth. It is correct as an explanation of the origin of punishment. Criminal law was in its origin a substitute for private vengeance. That is shown by the Jewish law of homicide, by the Saxon system of Wergilt, and by the Roman law, which punished the thief

caught red-handed twice as severely as the thief convicted afterwards by evidence taken in cold blood. The theory was that the owner would naturally be twice as angry in the first case as in the second, though, of course, the injury done either to himself or the community would be precisely the same. And this connection between punishment and vengeance is not simply a matter of history. It is still (as Sir Henry Maine has insisted\*) one of the purposes of punishment to serve as an outlet, a kind of safety-valve, for the indignation of the community. All laws ultimately depend for their enforcement upon the public sentiment in their favor; hence the legislator cannot afford to take no account of popular sentiment in their administration. There are many features of the modern criminal law which can only be defended on account of the desirability of keeping up a certain proportion between the measure of public indignation and the measure of legal penalty, for instance, the distinction made between accomplished crimes and attempts at crimes which have failed through causes independent of the offender's volition. Public opinion will sanction capital punishment when the blood of a brother man seems to cry for vengeance from the ground; it would not tolerate an execution for an attempted murder which has failed through a pistol missing fire. It may be doubted whether this irrational mode of estimating punishment by the actual and not by the intended effects of an act, is not sometimes carried unnecessarily far, as when, for instance, a magistrate remands a prisoner to see how his victim's wounds progress. Whence it would seem to follow that since a total abstainer's wounds heal sooner than a drunkard's, a man is to be punished more severely for stabbing a drunkard than for stabbing a total abstainer. In ways like this, deference to popular sentiment may be carried too far, but there can be no doubt of the soundness of the principle that the criminal law, while it seeks to guide, must not go too far ahead of popular sentiment, nor yet (as American lynch law occasionally reminds us) lag too far behind it.

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\* "Ancient Law," 4th ed., 1870, p. 389.

(2) The second half-truth held in solution by the retributive theory is the fact that punishment is reformatory as well as plainly deterrent. Very often, indeed, it will be found on examination that those who most loudly clamor for reformatory punishments do not really believe in the reformatory effect of punishment at all. Punishment is necessarily painful, or it ceases to be punishment. Those people who denounce any particular punishment on the ground that it is painful, really mean that you ought to reform criminals *instead of* punishing them. Now, of course, it is the duty of the state to endeavor to reform criminals *as well as* to punish them. But when a man is induced to abstain from crime by the possibility of a better life being brought home to him through the ministrations of a prison chaplain, through education, through a book from the prison library, or the efforts of a Discharged Prisoners' Aid Society, he is not reformed *by punishment* at all. No doubt there are reformatory agencies much more powerful than punishment; and without the co-operation of such agencies it is rarely that punishment makes the criminal into a better man. But it is none the less true that punishment does help to make men better, and not simply to induce them to abstain from punishable acts for fear of the consequences. At first sight this may seem to be a paradox; but it seems so only when we forget that every man has in him a better self; as well as a lower self. And if the lower self is kept down by the terror of punishment, higher motives are able to assert themselves. Fear of punishment protects a man against himself. If in the treatment of criminals we have to think much more of the deterrent than of the reformatory effects of punishment, it is otherwise in education. Fear of punishment by itself will seldom turn an idle boy into a diligent one; but there are few boys who could be trusted to work their best at all times, if in their weaker moments they were not kept to their duty by a modicum of fear; and there are few of us, perhaps, whose conduct would not fall still further behind our own ideal than it actually does, if our better selves were not sometimes re-enforced by fear of punishment,—at least in the form of social disapprobation or loss of repu-

tation. And in the case of actual crime, that conviction of the external strength of the moral law which punishment brings with it is usually at least the *condition* of moral improvement; though that conviction will not make a man morally better, unless the external judgment is ratified and confirmed by the appellate tribunal of his own conscience. Nevertheless, this external respect for the moral law is the first step to the recognition of its internal, its intrinsic authority.

Plausible as it looks to deny *a priori* that mere pain can produce moral effects, the absurdity of the contention becomes evident when it is seen that it involves the assertion that no external conditions have any moral effect upon character. Yet it is matter of common experience that men's characters are powerfully affected by misfortune, bereavement, poverty, disgrace. Adversity is not, of course, uniformly and necessarily productive of moral improvement. But no one will deny that under certain circumstances and with men of certain temperaments, great moral changes are often produced by calamity of one kind or another. In some cases the effect is direct and immediate; in other cases it operates indirectly through the awakening of religious emotions. In either case, of course, all that the misfortune does is to create conditions of mind favorable to the action of higher motives and considerations, or to remove conditions unfavorable to their action. Punishment, on its reformatory side, may be said to be an artificial creation of conditions favorable to moral improvement. The artificial creation of such conditions has, of course, this advantage over ordinary misfortune, that it is seen to be the necessary consequence of the wrong-doing, which is not necessarily the case with other alterations of circumstances.

In view of these considerations, we may, perhaps, go one step further and maintain that even in cases where punishment will not have a reformatory effect, where the tendencies to evil are too strong to be kept in check by fear, even then, punishment may be, in a sense, for the moral good of the offender. Wickedness humbled and subdued, though it be only by external force, is a healthier moral condition than

wickedness successful and triumphant. That is the extremest point to which we can go with the advocates of the vindictive theory. This is, I suppose, the truth which underlies the hackneyed expressions about avenging the insult offered to the moral law, vindicating the moral law, asserting its majesty, and so on. We recognize that punishment may sometimes be right, in the interests of the offender himself, even when it fails to deter. But still, it is always a certain effect on consciousness that constitutes its justification, not merely the satisfaction of an impersonal and irrational law.\*

A word will suffice to indicate the third and the highest truth which the vindictive theory of punishment caricatures. It is the truth—the great Aristotelian truth—that the state has a spiritual end.

We all know that experience sets tolerably strict limits to the extent to which it is desirable that the state should interfere with personal liberty and private life in the pursuit of moral and spiritual ends. There are many grave moral offences which the state may reasonably refuse to punish for quite other reasons than indifference to moral well-being. The offence may be incapable of exact definition. It might require for its detection a police-force which would be a public burden, or involve an inquisitorial procedure, or give rise to black-mailing and false accusation to an extent which would constitute a greater evil than the offence itself. The experience of the ecclesiastical court, which continued in full operation in this country down to 1642, would afford plenty of illustrations of the evils incident to such attempts to extend police supervision to the details of private life.† Very

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\* I should be prepared to recognize a larger amount of truth in the *a priori* view of punishment, if the idea of punishment were to be confined simply to the withholding of good things, to what theologians have called a *pœna damne*. That the bad ought not to be made happy, is a more reasonable proposition than the contention that they ought to be made miserable with no ulterior object. Further discussion of this thesis would seem, however, to belong rather to the theory of reward than to the theory of punishment.

† Since the penances imposed by the ecclesiastical courts were (and theoretically *are*) enforceable by imprisonment, no distinction in principle could be drawn between their action and that of the state.

often, no doubt, the difficulty arises largely from the fact that the attempt puts too great a strain upon the moral sense of the community. Many offences may be, on the whole, condemned by public opinion which are not condemned with sufficient earnestness to secure the enforcement of the criminal law against them. With all these admissions, it must still be contended that the state is perfectly entitled to repress immorality. If an act is not inconsistent with the *true* well-being either of the individual or that of society, it is not immoral; and, even if it were admitted that the state should not interfere with conduct affecting only the well-being of the individual, it is impossible that any act which affects the well-being of an individual should be without consequences for others also. The distinction between crimes and sins can be found only in considerations of social utility. A crime is simply a sin which it is expedient to repress by penal enactment.\* Every civilized state punishes some offences which cannot be said to be injurious to the "public good," unless moral well-being is considered to be part of the public good.

It must be remembered that it is not merely by actual and direct intimidation that the state can promote morality. The criminal law has an important work to do in giving expression to the moral sense of the community. Popular ideas as to the moral gravity of many offences depend largely upon the punishment which is awarded to them by the criminal courts. There are probably thousands who have hardly any distinct ideas about sin except those which are inculcated at Assizes and Petty Sessions. It is no uncommon experience for a clergyman to be told by a dying man—notorious, it may be, for fornication or drunkenness or hard selfishness—that he has nothing to reproach himself with, his conscience is quite clear, he has never done anything wrong that he knows of, he has no reason to be afraid to meet his God, and so on. Then upon inquiry it turns out that what the poor fellow

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\* In practice, of course, this term is usually reserved for the graver kinds of such offences. We do not talk about the *crime* of having one's chimney set on fire.

really means is that he has done nothing for which he could have been sent to prison.

There are many offences which the state can do little to check by the directly deterrent efforts of punishment, but which it can do much to prevent by simply making them punishable. Since a few persons with good coats have actually been sent to prison for bribery at elections, the respectable public has really begun to suspect that there must be something wrong in the practice. A very little reflection upon the different estimates which are formed of these forms of immorality or of dishonesty for which people go to prison, and of those for which they do not go to prison, will show at once the enormous importance of the criminal law in preventing the moral education of the public mind. While, therefore, there are some kinds of wrong-doing which, either from their essential natures or from collateral considerations, cannot be wisely dealt with by the criminal law, we may expect that with the necessary moralization of a community, the sphere of criminal law ought gradually to extend. In the growing disposition to enact and enforce laws against gambling, to assist, if not to enforce, temperance by act of Parliament, and to protect by the criminal law the chastity of young girls, we may recognize an instalment of moral progress.

HASTINGS RASHDALL.